CHARLES OOI KIAH INN & ANOR.

v.

KUKUH MAJU INDUSTRIES SDN. BHD. (FORMERLY KNOWN AS PEMBINAAN MUNCUL HEBAT SDN. BHD.)

SUPREME COURT, KUALA LUMPUR
TAN SRI DATUK GUNN CHIT TUAN CJ (MALAYA), TAN SRI DATO' HAJI MOHD. AZMI BIN DATO' HJ. KAMARUDDIN SCJ, DATO' PEH SWEE CHIN SCJ
[CIVIL APPEAL NO. 02-370-1992]
6 APRIL 1993

CONTRACT: Claim under letter of guarantee - Defence that letter of guarantee void - Consideration of s. 24 Contracts Act 1950.

The question that arose on this appeal was whether a letter of guarantee signed by the appellants in favour of the respondent the consideration for which was the withdrawal of complaints and charges made against the appellants was void as being illegal because the consideration for it was illegal or against public policy pursuant to ss. 24 & 25 of the Contracts Act 1950 (the Act).

Held:

[1] A promise not to prosecute need not be a sole promise or a substantial one. Even if the promise not to prosecute is merely a part of the promise or one of the promises of the promisee, it is a sufficiently prohibited consideration and would render the whole agreement unenforceable.

[2] Reading the companies' agreement and the letter of guarantee made on the same day by both sides together, it was clear that one of the considerations for the appellants to admit liability and undertake to pay off the indebtedness was that the respondent would withdraw the charges made in the police report. This was clearly a promise not to prosecute or continue any prosecution and tainted the whole of the companies' agreement and consequently the letter of guarantee.

[3] Such a contract to stifle prosecution was unlawful because the charges agreed to be withdrawn related to cheating which being a non-compoundable offence with the Court having no discretion to compound the same, the consideration or object was against public policy and was caught by the second limb of s. 24(e) of the Act.

[Appeal allowed with costs].

[**Bahasa Malaysia** Translation of Headnote]

KONTRAK: Tuntutan di bawah surat jaminan - Pembelaan bahawa surat jaminan tidak sah - Balasan s. 24 Akta Kontrak 1950.

Persoalan yang timbul pada rayuan ini adalah sama ada surat jaminan yang ditandatangani oleh perayu yang memihak kepada responden di mana balasannya ialah penarikan balik akan aduan dan tuduhan-tuduhan yang dibuatnya terhadap perayu adalah tidak sah kerana balasannya menyalahi undang-undang atau bertentangan dengan polisi umum menurut ss. 24 & 25 Akta Kontrak 1950 (Akta tersebut).

Diputuskan:

[1] Satu janji untuk tidak mendakwa tidak seharusnya menjadi janji tunggal atau substantial. Jika sekalipun janji untuk tidak mendakwa hanya merupakan sebahagian daripada janji tersebut atau salah satu daripada janji-janji yang dibuat oleh penjanji, ianya adalah balasan terlarang yang mencukupi dan akan menjadikan keseluruhan perjanjian tersebut sebagai tidak boleh dikuatkuasakan.

[2] Setelah membaca perjanjian syarikat-syarikat dan surat jaminan yang dibuat pada hari yang sama oleh kedua-dua pihak secara bersama, adalah jelas bahawa salah satu daripada balasan-balasan bagi perayu untuk mengakui liabiliti dan mengakujanji untuk menjelaskan hutang adalah bahawa responden akan menarik balik tuduhan-tuduhan yang dibuat dalam laporan polis. Ini adalah jelas satu janji untuk tidak mendakwa atau meneruskan sebarang pendakwaan dan ini mencemarkan keseluruhan perjanjian syarikat-syarikat dan juga surat jaminan.

[3] Kontrak yang sedemikian untuk menghalang pendakwaan adalah salah di sisi undang-undang kerana tuduhan-tuduhan yang dipersetujui untuk ditarik balik adalah berkaitan dengan penipuan yang merupakan kesalahan yang tidak boleh dikompaunkan di mana Mahkamah tidak mempunyai budibicara untuk mengkompaunkannya, balasan ataupun matlamatnya adalah bertentangan dengan polisi umum dan

termaktub dalam bahagian kedua s. 24(e) Akta tersebut.

[Rayuan dibenarkan dengan kos].

Cases referred to:
Ouseph Poulo v. Catholic Union Bank AIR 1965 SC 166 ***(foll)***
Kamini Kumar Basu v. Birendra Nath Basu [1930] PC 100 ***(foll)***
Bhawanipur Banking Corp. v. Durgesh Nandini AIR [1941] PC 95 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 24(e), 25
Criminal Procedure Code, s. 13(i)(a)

For the appellants - G. Sri Ram (John Fam with him); M/s. Ho & Fam
For the respondent - P.M. Mahalingam; M/s. P.M. Mahalingam & Co.

JUDGMENT

Peh Swee Chin SCJ:
Departing as we did, from the views held by the learned trial Judge in the instant case, while at the same time we were struck by the dearth of local reported cases on the legal points involved, we felt we ought to give our reasons in writing.

The factual background may be compendiously stated as follows. Both defendants were at all material times directors of two companies *viz*. Moveland Properties Sdn. Bhd. (hereinafter Moveland Properties) and another company called Rotraco Sdn. Bhd. (hereinafter Rotraco). The first defendant was at all material times also an architect, being at the same time a partner in a firm of architects.

In 1984, the plaintiff, a building contractor entered into a contract with each of the two companies separately for the construction in each case of 10 units of 3-storey buildings in the Batu Caves area and in both contracts, the 2nd defendant had signed for both companies, though the 1st defendant appeared to have stage-managed them.

At the signing of the contract with Moveland Properties that is Moveland Properties Sdn. Bhd., its full name was not used in the contract but a shorter name was used, *viz*. "Moveland Sdn. Bhd.", with the word "Properties" from the full name of Moveland Properties missing therefrom. This missing word was the crucial factor in this case.

Towards the end of 1986, the two companies were lagging behind in payment according to the tenor of certificates of payment, the plaintiff then filed two separate civil suits against the companies respectively, being Kuala Lumpur High Court Civil Suits T23-257-86 and T23-264-86 respectively with "Moveland Sdn. Bhd." cited in one of the two actions, as the defendant.

In early 1987, a search was made by the plaintiff at the Registry of Companies and plaintiff found there was no company registered as "Moveland Sdn. Bhd". Plaintiff thought both the defendants had deceived it by making it sign a contract with a non-existing company. Plaintiff then lodged a report to the police to the same effect apparently but it was not produced in evidence. What action, if any, taken by the police was neither in evidence.

Two letters were also written in 1987 pursuant to such discovery by the plaintiff to the President of the Board of Architects of Malaysia and as stated by PW1, a director of the plaintiff in evidence thus: "The main ground of complaint was that D1 was architect as well as developer for these works". "D1" refers to 1st defendant.

Both the police report and the letters of complaint to the Board of Architects of Malaysia were not produced by the plaintiff, understandably, for the statement of defence filed by the defendants had pleaded illegality arising out of withdrawal of the complaints both to the Board and the police, with such withdrawal as consideration for the contract of guarantee signed by both defendants and for which they were being sued. The defendants did not produce them if they had them, because in part, apparently they elected not to call any evidence at the end of plaintiff's case and preferred to make a submission on the case there.

To revert to some sort of chronology of our narrative, one Mr. Terrence Oh, apparently at the request of the first defendant arranged for meetings and negotiations between the defendants and the plaintiff to mediate a settlement of the plaintiff's claims in the two civil suits, culminating in the signing of two documents on the same date, one a fairly elaborate agreement in the form of a letter addressed to both defendants and signed by two directors of the plaintiff (one of whom was PW1) with an acknowledgement at the foot of the letter signed by both defendants as directors on

behalf of Moveland Properties and Rotraco respectively agreeing and undertaking to abide by the contents of the letter (hereinafter called the companies' agreement). The other document was also in the form of letter addressed to the plaintiff in which both defendants, jointly and severally guaranteed the plaintiff that they would settle liabilities, etc. in the companies' agreement (this 2nd document is hereinafter called letter of guarantee). Both documents are set out below for ease of reference; first the companies' agreement, followed by the letter of guarantee, and at that time the plaintiff had not changed its name to the present one, it will be observed and had still used its old name of "Pembinaan Muncul Hebat Sdn. Bhd.":

PEMBINAAN MUNCUL HEBAT
SDN BHD

11 January 1988

Mr Charles Ooi Kiah Inn
1 Jalan 6/24, Petaling Jaya

Datin Salmah bte Haji Safarwan
1 Jalan Istimewa
Off Jalan Sungei Putus
Kampung Batu Belah
Selangor

Dear Sir/Madam

Re: Terms And Conditions For Settlement Of 20 Units of 3 Storey Light Industrial Buildings At Lot No. 10230 Sublot P.T. 14460 & 14469, 14470-14479 Jalan Batu Caves, Mukim of Gombak, Selangor

We write to confirm that you have admitted owing jointly and severally the sum of Ringgit One Million Nine Hundred Thousand (RM1,900,000) only interest free to us at the meeting held at the office of Mr. Terrence Oh Seong Lye of M/s. Harun, Oh & Wong on 6 January 1988.

1. The signed copy of this letter and a sum of Ringgit Fifty Thousand (RM50,000) be handed immediately to Mr Terrence Oh Seong Lye as stakeholder. This amount shall be released to us upon us fulfilling the following 2 conditions with regard to the - L.A.M. P.A.M. Letter dated 11 July 1987 and 1 December 1987 respectively.

   (a) We shall withdraw all the complaints against you on the above captioned matter; and

   (b) We shall withdraw our charges against you as detailed in the police report dated 25 March 1987.

2. A sum of Ringgit Fifty Thousand (RM50,000) be paid: to Terrence Oh Seong Lye as stakeholder before or on 15 February 1988 and a further sum of Ringgit One Hundred Thousand (RM100,000) be paid on or before 29 February 1988. These payments will be withheld by Terrence Oh Seong Lye until such time that the police report and complaint mentioned in clause 1(a) and (b) above are properly satisfied.

3. An amount of Ringgit Five Hundred and Fourty Thousand (RM540,000) will be paid in the form of 2 units of 3 storey light industrial buildings (25' x 60 built up area per floor). We will have the right to determine the 2 intermediary units free from all encumbrances. The units will be delivered to us by 31 May 1988 free of all encumbrances.

4. The balance sum of Ringgit One million, One Hundred and Sixty Thousand (RM1,160,000) will be paid in monthly instalments of Ringgit Thirty Thousand (RM30,000) before or on the last day of each calendar month commencing in the month of March 1988.

5. We will have the option of taking units at a price to be agreed upon to offset the balance sum due to us.

6. There is an existing guarantee of Charles Ooi with regard to the property held by Spontaneous Yield Sdn. Bhd. which is a 100% subsidiary of Berguna Jaya Development Sdn Bhd. This guarantee has an exposure with MUI Bank, the value of which may exceed the present market value. There is intention by the bank to dispose of the property to recover the oustanding loan and interest. Any shortfall in the amount owing to MUI Bank from the forced sale will be utilised to offset the outstanding amount due to this agreement.

7. That all parties hereto shall release whatever antecedent claim, counterclaim of whatever nature arising from any matter preceding this settlement agreement henceforth.

8. All payments will be in the form of cash cheques.

9. Time is of the essence.

Yours faithfully,
Pembinaan Muncul Hebat Sdn. Bhd.

Sgd.	Sgd.
...	...
Abdul Majid bin Abdul Aziz	Aziz bin Sham
(I/C No. 6190473)	(I/C No. 2143688)
Director	Director

I, Charles Ooi Kiah Inn (Nric No. 0263281) have read the terms and conditions abovestated and agree thereto and undertake to abide thereto.

Sgd.
...
Charles Ooi Kiah Inn (Director, Moveland Properties Sdn. Bhd. & Rotraco Sdn. Bhd.)

Date: 11 January 1988

I, Datin Salmah bte Haji Safarwan (Nric No. 8246560) have read the terms and conditions abovestated and agree thereto and undertake to abide thereto.

Sgd.
...
Datin Salmah bte Haji Safarwan (Director, Moveland Properties Sdn. Bhd. & Rotraco Sdn. Bhd.)

Date:

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11 January 1988

Encik Abdul Majid bin Abdul Aziz/
En Aziz bin Sham
Pembinaan Muncul Hebat Sdn. Bhd.
53A Jalan SS2/75
47300 Petaling Jaya

Dear Sir

We, Charles Ooi Kiah Inn and Datin Salmah bte Haji Safarwan, hereby guarantee that should M/s. Moveland Properties Sdn. Bhd. and M/s. Rotraco Sdn. Bhd. default in their commitments as set out in the agreement dated 11 January 1988, we jointly and severally, agree to undertake to settle the same mentioned liabilities without exception.

Yours faithfully

...	...
Charles Ooi Kiah Inn	Datin Salmah bte Haji Safarwan
(I/C No. 0263281)	(I/C No. 8246560)

cc Mr. Terrence Oh Seong Lye
c/o M/s. Harun, Oh & Wong

Only about RM140,000 was paid after the above documents were signed to account of RM1.9 million undertaken by both defendants to be paid and again the present action herein was filed to recover the balance.

In the suit herein, the plaintiff claimed the balance of RM1.760 million from both defendants on the basis of the letter of guarantee for all practical purposes, as guarantors. The defendants resisted by alleging in the defence two matters; first, duress, which we took them, to mean "coercion" under our own Contracts Act 1950 and secondly that the letter of guarantee was void as being illegal because the consideration for it was illegal or against public policy.

At the end of the plaintiff's case, the defendants elected not to call evidence as they were entitled to do so and both parties thereupon made their submissions.

The learned trial Judge gave judgment for the plaintiff as prayed and against that judgment, the defendants appealed.

The learned Judge dealt with the issue of duress for which he found no evidence and rejected it, and with this we entirely agreed.

However, in the second defence of illegal consideration or consideration being against public policy in connection with the letter of guarantee, the learned trial Judge held that the substantial consideration of the companies' agreement and the letter of guarantee was the "composition" of money owing by the two companies to plaintiff and the "mutual" agreement to withdraw all claims against each other and to quote: "That consideration's perfectly legal". By composition we presumed his Lordship meant a settlement.

The learned trial Judge remarked on the failure of defence to specify the particular sub-section of s. 24 of the Contracts Act 1950 apart from citing s. 24 and illustration (h) to s. 24. For ease of reference, s. 24 and illustration (h) to s. 24 and s. 25 of the Contracts Act 1950, (hereinafter the Act) are set out below:

> Section 24. The consideration or object of an agreement is lawful, unless -
>
> (a) it is forbidden by a law,
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person or property of another; or
>
> (e) the Court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

(a) ...
(b) ...
(c) ...
(d) ...
(e) ...
(f) ...
(g) ...
(h) A promises B to drop a prosecution which he has instituted against B for robbery and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.
(i) ...
(j) ...
(k) ...

Section 25. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

The learned trial Judge dealt with illustration (h) and was of the view that to sustain such a defence as in illustration (h) there must at least be a threat of continuing a prosecution which a plaintiff had initiated and there was none and that, to quote: "In the absence of an on-going prosecution where the primary motive of the parties is to stifle the prosecution, I know of no law or policy which stipulates these parties should not privately settle their differences. Indeed the policy of the law has always been to encourage reasonable settlements". And the learned trial Judge further observed: "It is to be noted cheating is not an offence which needs to be reported under s. 13(i)(a) of the Criminal Procedure Code".

We regret we were unable to agree with the views of the learned trial Judge stated above.

The defence raised by the defendants was, without doubt, the well-known defence, known as an agreement to stifle prosecution and no Court will enforce such an agreement for it should be apparent that if such agreement, if allowed to be enforced, could mean that the law of freedom to contract has been abused for purpose of extortion where the person accused is innocent, or where he is guilty, it has been abused for making a trade of a crime.

In our opinion, the principles applicable to our instant case were incidentally and carefully dealt with in an Indian Supreme Court case in *Ouseph Poulo v. Catholic Union Bank* AIR 1965 SC 166, and the Privy Council's Indian appeal of *Kamini Kumar Basu v. Birendra Nath Basu* [1930] PC 100, and there is no need to quote *in extenso,* passages from them apart from saying that we share the views expressed therein.

Such contracts to stifle prosecution are unlawful because their consideration or object is against public policy and they are caught by the 2nd limb of s. 24(e) of the Act.

It is to be emphasized that for Malaysia and as in India it is only when the stifling of prosecution relates to non-compoundable offences as specified in our penal Code, that our Courts consider such agreements as void for being unlawful under s. 24 of the Act. When they refer to compoundable offences or offences which are compoundable with the leave of the court, such contracts would not be void and would then be indeed encouraged by the Courts as stated by the learned trial Judge. The reliance by the learned trial Judge on the fact of the offence of cheating need not be reported to the police under Criminal Procedure Code would appear to us to be of no avail.

Our courts must, as stated in *Ouseph Poulo*, inevitably inquire: "Did one party to the transaction make his promise in exchange or part exchange of promise of the other not to prosecute or continue prosecuting?" This means also, be it noted that the promise not to prosecute need not be a sole promise or a substantial one, it is sufficient if it is merely a part of the promise or one of the promises of the promisee. If it is, it is a sufficiently prohibited consideration or object for the ensuing consequence of the unenforceability of the whole agreement. This inevitable enquiry seems to dovetail with s. 25 of the Act set out above. If that be so, it will be seen that the genuineness or reality of a debt would be irrelevant if an agreement to stifle prosecution is part of the consideration for payment of a debt. Please see also *Bhawanipur Banking Corp. v. Durgesh Nandini* AIR [1941] PC 95.

We also share the same view expressed to the effect in *Kamini supra* that a pending prosecution need not at all be a prerequisite for impugning such an agreement to stifle

prosecution and we did not find therefore the contrary view of the learned trial Judge acceptable.

It is of course envisaged that, more often than not, such impugned object or consideration is not stated in the agreement expressly, but sometimes a necessary inference can be drawn from the evidence, it will then be sufficient. Thus a pending prosecution in court could lend weight to the inference sought to be established. A pending prosecution is a mere matter of weight of evidence.

Reverting to our instant case, the companies' agreement and the letter of guarantee made on the same day by both sides in the case would have to be read together, as much as both documents had to be and were in fact cited in the statement of claim of the plaintiff. Obviously, the consideration for supporting the letter of guarantee would have to come from the companies' agreement otherwise the letter of guarantee would *ex facie* be starkly bare of any consideration. Looking at the companies' agreement, it would be plain to all and sundry that one of the considerations for the defendants to admit liability and to undertake to pay off the indebtedness by instalments etc. mentioned therein was expressly stated by the plaintiff as: "We shall withdraw our charges against you as detailed in the police report dated 25 March 1987". This, among the other considerations, would taint the whole of the companies' agreement, and consequently the letter of guarantee, for the promise was clearly one of promise not to prosecute or not to continue any prosecution.

The "charges" referred to above to be withdrawn could be irresistibly those related to cheating as appeared from the evidence of PW1, the director of plaintiff/company that he had lodged the report to the police for he was under the impression that the defendants had made him enter into an agreement with a non-existent company. This evidence from the witness must have come out with considerable reluctance for he must be aware of the defence of the defendants described above, though so little but yet more than enough was said.

Cheating under the Penal Code is non-compoundable with no discretion to the court to grant leave to compound the same, and to stifle prosecution for cheating therefore is certainly a mischief which s. 24 of the Act, provides for also.

We therefore allowed the appeal by dismissing the claims of the plaintiff with costs here and below to the defendants, and further ordered that the deposit in court be refunded to the defendants/appellants to account of taxed costs.